

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation
of the

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

v.

AVIS BUDGET GROUP, INC., a Delaware
Corporation,

Respondent.

ELEANOR REED,

Complainant.

Case No.

E200607-A-0811-00-mpe
C 07-08-049

10-05-P

DECISION

Administrative Law Judge Ann M. Noel heard this matter on behalf of the Fair Employment and Housing Commission on May 18 through 20, 2009, and June 12, 2009 in San Francisco, California. Gregory J. Fisher, then Associate Chief Counsel, represented the Department of Fair Employment and Housing (DFEH). Nelson Chan, Senior Staff Counsel, represented the DFEH in its brief filed in further argument. Paula Champagne, Esq., of Littler Mendelson, P.C., represented respondent Avis Budget Group, Inc. Complainant Eleanor Reed and Avis Budget Group representative Christine T. Connolly Dixler, Esq., were present throughout the hearing.

Both parties timely filed closing briefs on August 17, 2009. The DFEH filed a rebuttal brief on August 20, 2009, and the matter was submitted on that date. On March 25, 2010, Administrative Law Judge Ann M. Noel issued her proposed decision.

On March 30, 2010, the Commission decided not to adopt this decision and notified the parties of the opportunity to file further argument (NOFA) by April 27, 2010. (Cal. Code Regs., tit. 2, § 7434, subd. (b).) The parties timely filed written argument.

After consideration of the entire record and review of the parties' further argument, we issue our per curiam decision, setting out the findings of fact, determination of issues and order. We designate this decision as precedential. (Gov. Code, §§ 12935, subd. (a), 12972, subd. (a); Cal. Code Regs., tit. 2, § 7435, subd. (a).)

FINDINGS OF FACT

1. On March 19, 2007, complainant Eleanor Reed (Reed or complainant) filed a written, verified complaint with the DFEH against her former employer, Budget Rent-a-Car. The complaint alleged that from May 14, 2006 to December 11, 2006, Budget Rent-a-Car treated complainant differently because of her race, African American, and mental disability, and failed to reasonably accommodate her mental disability. The complaint alleged that this conduct violated the Fair Employment and Housing Act (FEHA or Act). (Gov. Code, § 12900 et seq.)

2. The DFEH is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On March 18, 2008, Phyllis W. Cheng, in her official capacity as Director of the DFEH, issued an accusation against respondent Avis Budget Group, Inc., a Delaware corporation (Avis Budget Group or respondent). The accusation alleged that Avis Budget Group discriminated against Eleanor Reed on the basis of her mental disabilities: generalized anxiety disorder, cyclothymic adjustment disorder with depression, and post traumatic stress disorder, in violation of the FEHA. Specifically, the accusation alleged that from June 20, 2006 through June 22, 2007, respondent: 1) failed to reasonably accommodate Reed's disabilities; 2) failed to engage in a timely, good faith, interactive process regarding reasonable accommodation of Reed's disabilities; 3) made unlawful inquiries about Reed's disabilities; 4) treated Reed differently than other similarly-situated employees in the terms, conditions and privileges of her employment; and 5) failed to take all reasonable steps necessary to prevent discrimination from occurring. The DFEH asserted that this conduct violates, respectively, Government Code section 12940, subdivisions (m), (n), (f), (a), and (k). The DFEH sought an order of back pay, benefits, out-of-pocket expenses, reinstatement, reinstatement of seniority rights, compensatory damages for emotional distress, an administrative fine, and a variety of affirmative relief.

3. On September 26, 2008, the DFEH filed an amended accusation which, in addition to the above allegations, also alleged that respondent had discharged and retaliated against Reed for opposing practices forbidden by the FEHA and for filing a complaint against respondent for its alleged violation of the FEHA, in violation of Government Code section 12940, subdivision (h). The amended accusation also asked for the alternative of front pay in lieu of reinstatement.

4. At a date unspecified in the record but prior to February 3, 2009, Reed retained a private attorney, Richard Rogers, Esq., to represent her in a private lawsuit alleging retaliation against respondent, filed in federal court. On February 3, 2009, the DFEH filed a second amended accusation that limited its claims in this administrative action to those alleged in the original accusation, not to include unlawful termination of employment and retaliation prior to Reed's layoff. The second amended accusation specifically eliminated the retaliation charge, Government Code section 12940, subdivision (h), sought lost wages only up to June 26, 2007, and did not seek emotional distress damages either for Reed's layoff or for respondent's failure to reinstate her from that layoff.

5. In 2000, Budget Rent-a-Car, Inc. (Budget) was a rental car company incorporated in Delaware and doing business in California. In November 2002, Cendant Corporation (Cendant), a New York corporation, purchased Budget, adding this company to its rental car company portfolio, which included Avis Rent-a-Car. On September 6, 2006, Cendant divided its holdings and formed respondent Avis Budget Group, Inc. from the two separate rental car companies, Avis Rent-a-Car and Budget. Each entity during the respective time periods noted—Budget (2000 through November 2002), Cendant (November 2002 through September 2006), and Avis Budget Group (September 2006 through the date of hearing)—did business in California renting cars to the public, employing customer service representatives at its car rental counters, and employing rapid return agents assisting customers return their rental cars.

6. Avis Budget Group is a successor employer for Cendant and Budget, this status uncontested by the parties. The responsibilities of Avis Budget Group's customer service representatives remained the same under the ownership of Budget, Cendant and Avis Budget Group. Avis Budget Group is an employer within the meaning of Government Code section 12926, subdivision (d) and 12940, subdivisions (m), (n), (f), (k), and (a).

7. On February 24, 2000, Budget hired complainant Eleanor Reed as a full-time Customer Service Representative at San Francisco International Airport. As a Customer Service Representative, Reed worked at the Budget car rental counter renting cars to customers. She received "Counter Sale Incentives," a form of commission, for selling rental car insurance, car upgrades and pre-paid gasoline to customers. Reed was a good sales agent and did well selling these items and earning commissions.

Reed's Mental Health Medical History from February 2000 to June 2006

8. On February 8, 2000, Reed began treatment with Kaiser Permanente mental health professionals in Redwood City for treatment of symptoms of anxiety and depression. Her doctors prescribed medication for depression, which alleviated her depression symptoms.

9. On June 22, 2001, Reed had an appointment with Paul T. Wilson, M.D., Ph.D., Chief of Psychiatry at Kaiser Permanente in Redwood City and told him that she continued to experience anxiety. After discussing Reed's symptoms with her, Dr. Wilson diagnosed Reed with major depression and Post Traumatic Stress Disorder (PTSD) caused by extreme physical and sexual violence and emotional abuse from a family member during her childhood and further physical and emotional abuse from her former husband when she was an adult. Reed's primary PTSD symptom diagnosed by Dr. Wilson was persistent anxiety, with a heightened sense of threat to stimuli in her environment, caused by "boundary" violations to her personality and body from the abuse she had undergone. Dr. Wilson noted that once Reed felt threatened, her PTSD manifested with "flight or fight" coping mechanisms to manage the anxiety, manifested either by physically fleeing stressful situations to avoid the threat or, if she felt that she had no option but to stay, exploding in an emotional outburst. Reed had experienced anxiety arising out of her interactions with some

employees and supervisors. Reed worried that co-workers were conspiring against her and that managers would not allow her to respond to allegations against her. In contrast, Reed's PTSD symptoms were not triggered by her interactions with rental car customers and she was able to perform her customer sales representative functions dealing directly with customers.

10. As part of Reed's medical treatment, on June 22, 2001, Dr. Wilson concluded that, to manage Reed's anxiety level, he would limit the number of hours that she worked, reducing her work hours from eight hours per day to six. At that time in June 2001, Reed was on a California Family Rights Act (CFRA) leave for reasons that were unspecified in the record. That leave was due to expire June 28, 2001. Dr. Wilson supplied Reed with a medical note for her employer, requesting a modified work schedule upon her return from her CFRA leave. The note did not specify the reason for the reduced work schedule. That same day, Reed submitted Dr. Wilson's note to her employer, requesting a modified work schedule of six-hours per day upon her return from CFRA leave, beginning June 29 and ending July 31, 2001, later extended by a Kaiser mental health professional, Dr. Hinda Sack, Ph.D., to August 20, 2001. Budget agreed to the reduced work schedule and to the extension. After August 20, 2001, Reed returned to working an eight-hour-a-day schedule.

11. Reed continued to see Dr. Wilson regarding her anxiety and PTSD through November 2006. From March 6, 2002, through April 11, 2002, Reed took a medical leave of absence recommended by Dr. Wilson, and thereafter, worked a reduced six-hour day from April 12, 2002, to June 30, 2002 based on a note provided to her by Dr. John Peters, Kaiser's Chief Psychologist. Budget did not ask Reed about the reasons for the leave and the reduced hours. Working a six-hour day successfully reduced Reed's PTSD symptoms of stress and anxiety. On or about July 1, 2002, Reed returned to working eight hours per day.

12. At a date shortly before July 30, 2004, one of Reed's co-workers alleged to Monte Hill, a senior human resources representative with respondent, that Reed had deliberately hit the co-worker in her head. When questioned by Hill about the incident, Reed stated that she could not remember it. On July 30, 2004, Hill attempted to meet with Reed regarding this allegation. Reed left work rather than meet with him. Reed called her mental health doctors at Kaiser Permanente for medical advice and called in sick for several days thereafter.

13. From August 4, 2004 until August 30, 2004, Dr. Mary Beth Grabon, Ph.D., a Kaiser mental health professional, ordered Reed be placed on a leave of absence. The medical note did not specify a reason. Respondent granted the leave.

June 2006 Medical Request for Six-Hour Work Day

14. On June 14, 2006, Reed met with Dr. Wilson to discuss her PTSD symptoms of anxiety. Dr. Wilson concluded that, based on Reed's continuing anxiety and his experience treating her over the prior five years, Reed should renew limiting her work day to six hours, and to do so for a year, as he did not think it likely that her symptoms would improve during

that time and a reduction in work hours best managed her symptoms. Reed had found that working a six-hour day successfully reduced or eliminated conflicts with her supervisors and her co-workers, because before stresses with her interactions with colleagues could reach a crisis point in her work day, she could leave. Dr. Wilson wrote a note for Reed limiting her work day to six hours and stating that she needed this work restriction for one year, from June 14, 2006 to June 14, 2007.

15. On June 19, 2006, Reed presented Dr. Wilson's note to her respondent supervisor, Matt Spain, requesting the medical restriction of a six-hour work day. Reed told Spain that she suffered from depression and bipolar disorder.¹ This was the first time that Reed had disclosed that she had mental conditions to anyone in her work place. Spain told Reed to "punch out" her time card and go home. When Reed asked why she was being sent home, Spain told Reed that respondent did not have work for her and she would need to leave work and wait until management called her. That day, respondent placed Reed on an involuntary, indefinite unpaid leave.

16. On June 20, 2006, Matt Spain gave Reed's doctor's note to respondent's newly hired Human Resources Manager for Northern California, Erinn Height. Height had received no training by respondent on how to handle reasonable accommodation requests. Reed's request was the first that Height had received at respondent. In her prior employment, Height had handled approximately 12 employee requests for reasonable accommodation.

17. Erinn Height asked her supervisor, Christopher Rolletta, Human Resources Manager of the West Area, how she should respond to Reed's request. Rolletta found the request for an accommodation for a year to be unusual. Rolletta suggested that Height contact respondent's in-house counsel, Christine Connolly Dixler, Esq., based in New Jersey, for guidance on how to proceed.

18. Height contacted Dixler and also Monte Hill and asked Hill for "all that [he] had on [Reed]," including disciplinary records. Hill gave Height Reed's workers' compensation records from 2003 and her entire personnel file, including an account of an alleged conflict with a co-worker in 2004, even though, under Article 11 of the Teamsters' Union contract between respondent and its employees, disciplinary matters in the file were to be removed after nine months. Height also heard a rumor from an unnamed respondent manager that Reed wanted to pursue a career selling real estate. Dixler, according to Height, instructed Height not to ask Reed questions about her accommodation request. Height did not contact Reed, who remained on unpaid leave. At no time did anyone from respondent ever ask Reed if she had plans to work in real estate.

19. In June 2005, while Reed was out on medical leave for adhesive capsulitis, a shoulder condition, she had obtained a real estate license. In July or August 2005, Reed

¹ This description of Reed's mental disabilities was not confirmed by her medical records or by the testimony of Dr. Wilson, which diagnosed Reed with major depression and PTSD, not bipolar disorder.

placed her license with a real estate broker and her name was thereafter listed on the broker's web site. Reed obtained her first client in October or November 2005. At some point in time thereafter, unspecified in the record, Reed told her co-workers that she was a real estate agent and gave her business card to a co-worker, Sandra Ruiz. Reed's license stayed with the broker until the broker went out of business in 2008. Reed worked as a real estate agent part-time for only six to eight months. During these months, Reed sold a condominium, showed three houses, and had two clients "that found homes." The precise dates she sold real estate and any resultant earnings were not specified in the record. Sometime after June 2006 when Reed was on leave while respondent considered her request for a six-hour day, she also purchased a personal residence serving as her own real estate agent, but she did not otherwise use her real estate license.

20. During Reed's tenure at respondent, she was a member of the Teamsters' Union, Local 856 ("Teamsters' Local 856") and subject to the terms of the Teamsters Local 856 collective bargaining agreement ("the Teamsters' contract") with her employer, signed by respondent and union representatives on September 23, 2005 and in effect from October 1, 2004 through September 30, 2007. Article 11 of the contract provided that disciplinary notices were to be expunged from the employee's personnel file after nine months.

21. Article 16 of the Teamsters' contract provided that "Forty (40) hours shall constitute a work week. . . ." Article 21(b) of the Teamsters' contract, entitled "Less Than 80 Hour Employees," provided "These part-time employees, hired after 10-01-85, shall not be employed for the purpose of depriving regular employees of premium pay work. These employees will be scheduled to work less than eighty (80) hours in a month." Article 21(b) also provided: "If an employee works more than eighty (80) hours in a month the Employer will be obligated to make full Health & Welfare contribution on the behalf of that employee for that month." Article 21(b) also provided that "Part-time employees cannot be employed if any full-time employee is laid off at their location." A memorandum of understanding signed the same date as the contract reiterated that employees must work 80 hours a month to receive health benefits. A Letter of Understanding attached to the contract and signed by the union on September 29 2005, however, stated that the right to receive medical benefits for less than 40 hours per week employees was eliminated. Nonetheless, it provided that two respondent employees, Sandra Ann Ruiz and Cassandra Shoars, who worked more than 20 hours but less than 40 hours because of industrial injuries, would continue under this contract to receive pro rata sick days, holidays, vacation, pension and full health and welfare benefits.

22. Reed was concerned that her continued unpaid leave would affect her medical benefits. Shortly after she was placed on leave, Reed asked several respondent personnel, including Matt Spain, Erinn Height and a respondent health benefits administrator, "Patricia," whose last name was not provided in the record, about the status of her medical benefits while on leave. The health benefits administrator told her that she needed to work 80 hours per month to retain her health benefits, as provided under Article 21(b) of the Teamsters contract. The record did not establish whether Spain responded. Height told Reed that she was not sure what would happen with Reed's health benefits and would let her know her health benefits status later. Despite repeated inquiries by Reed to Height, no subsequent

communications, either written or oral, by Height to Reed between June through October 2006 addressed the issue. As a result, Reed believed that she had no health coverage after she was placed on leave.

23. In June 2006, Reed sought assistance from Teamsters' Local 856 to help her with her reasonable accommodation request. On June 23, 2006, Donald Lawson, a Teamsters' Local 856 attorney, filed a grievance on Reed's behalf for respondent's failure to reasonably accommodate Reed. A copy of the letter was sent to Matt Spain and Erinn Height.

24. Also on June 23, 2006, Reed called a respondent-maintained employee help line to report that she needed to return to work as soon as possible in order to meet impending financial obligations, including her mortgage payments. Erinn Height reviewed the call report details and was aware of Reed's financial situation. Height did not contact Reed for a week.

25. On June 30, 2006, Erinn Height sent Reed a letter which asked Reed to provide more information about her condition by having her medical provider, Dr. Wilson, complete respondent's Accommodation Request Form by July 14, 2006. That form asked Dr. Wilson to provide specific information on:

- Reed's medical diagnosis;
- Reed's medications and their side effects;
- any "mitigating measures utilized" and the degree of effectiveness in "reducing functional limitation";
- the effect of Reed's medical condition on her major life activities;
- a description of the impact and duration of Reed's medical condition;
- whether Reed could perform the tasks in the job description in light of her medical condition;
- any applicable restrictions and duration;
- any accommodations that would enable Reed to perform the tasks that Reed's medical condition precluded her from performing;
- any injury, harm or aggravation that Reed might experience by performing the job duties due to her medical condition and the medical reason for that conclusion;
- whether the medical condition was temporary or permanent; and
- whether and when Reed was likely to recover sufficiently to perform the job duties without accommodation or restriction.

In addition to the information requested of Dr. Wilson, the form asked Reed to authorize access to her present or past medical records "considered pertinent to [her] medical history, [her] accommodation request or [her] fitness for duty" and permission for respondent to speak with Dr. Wilson about any of his responses on the form.

26. Also on June 30, 2006, Erinn Height responded in writing to Teamsters' attorney Donald Lawson regarding Reed's grievance. Height stated that respondent had received Reed's request for accommodation and "was engaging in the interactive process" with Reed and thus, there was no basis for the grievance.

27. On July 10, 2006, Dr. Wilson completed the Accommodation Request Form and returned it to Reed to give to respondent. Dr. Wilson indicated:

- Reed suffered from major depression and PTSD;
- The medications that Reed was taking for these conditions;
- No mitigating measures were used;
- Reed's PTSD led to avoidance of social interactions with significant impact for her;
- Reed could perform her work duties but should not work more than six hours a day to avoid flare up of her PTSD symptoms;
- The accommodation requested was a six-hour work day;
- Reed's PTSD symptoms were aggravated when Reed's stress level increased which occurred with prolonged periods of work over six hours;
- Reed's medical condition was permanent; and
- Reed would likely need accommodation for the "foreseeable future."

28. On the Accommodation Request Form supplied by respondent, Reed declined to sign the section authorizing respondent personnel to view her medical records or to speak to her doctor. Reed specifically did not want respondent to have information about her childhood history of sexual abuse, nor did she want respondent personnel talking with Dr. Wilson, fearing that any information that he revealed would be used as "ammunition" against her. Reed returned the form as completed by Dr. Wilson to respondent on or about July 14, 2006.

29. On or about July 14, 2006, Height and Reed spoke by telephone. The record did not indicate who initiated the call. Reed told Height that Reed was uncomfortable having a respondent representative speaking with Dr. Wilson and did not want respondent looking through her medical records.

30. Height did not consider the information provided by Dr. Wilson in the Accommodation Request Form adequate. Height did not question the veracity of Dr. Wilson's information but wanted to know the following: 1) if there were any further restrictions beyond the six hour limit regarding specific shifts and their volume of work; 2) whether Dr. Wilson's statement that Reed's PTSD led to avoidance of social interaction would allow Reed to perform the essential functions of her job, interacting with rental car customers, especially during peak hours; and 3) if Reed wanted time off so that she could develop a real estate practice as Height had heard rumors from managers who had allegedly heard from co-workers that Reed had obtained a real estate license and done real estate work

in the past. Height did not communicate any of her concerns to Reed, however, either to answer these questions directly or to relay them to her doctor to answer.

31. On August 9, 2006, Height sent Reed a letter requesting that Reed either consent to the release of her medical records “pertinent to her current disability” or agree to submit to an examination from a respondent-chosen doctor. The letter did not indicate Height’s specific questions or concerns she had about Dr. Wilson’s responses. The letter stated that Reed had until August 23, 2006, to respond with her decision. Reed tried to call Height during this time, leaving messages, but Height did not return her calls. Height made no attempt to call or to return Reed’s calls for the next 19 days.

32. On August 28, 2006, Height sent Reed a second letter iterating her request for Reed either to release her “pertinent” medical records or to consent to a medical examination from a respondent-selected doctor, a process estimated to take six hours. Reed received the August 28th letter and called Height on August 31, 2006. Reed pleaded with Height not to require her to see a respondent-selected doctor. Height insisted that if Reed would not release her medical records, Reed must see respondent’s selected doctor so that respondent could ascertain what caused Reed’s depression and anxiety. Reed chose to see the company-approved doctor rather than release her medical records. Height did not tell Reed when she could expect to see the doctor or when or if she would be placed back to work.

33. Although Reed had chosen to see respondent’s-approved doctor, she was distressed at the prospect of seeing a doctor that she did not know and would see only once and discussing her medical condition with that doctor, included painful, private events from her childhood. Reed understood from Height that she had to see respondent’s doctor or the company would deem that she had abandoned her job.

34. Between June through November 2006, Reed frequently telephoned Height, leaving messages asking about her reasonable accommodation request and whether she would receive medical benefits. After August 28, 2006, Reed also called Height to ask questions about seeing the respondent-approved doctor. With rare exceptions, Erinn Height did not return her calls. On two occasions, Height telephoned Reed and Reed missed the calls but immediately returned Height’s call and left a message. Both times, Height did not answer the calls. Reed’s inability to speak with Height compounded Reed’s anxiety, frustration and feeling of helplessness regarding her accommodation request.

35. Reed asked Teamsters’ Union counsel Donald Lawson for assistance in contacting Height to resolve her accommodation request. Lawson also attempted to call Height on Reed’s behalf. Height returned only one of Lawson’s numerous telephone calls from June to November 2006, leaving him a voicemail message but never speaking with him directly.

36. On September 8, 2006, Donald Lawson sent Height a letter on Reed’s behalf memorializing a telephone message that he had left for Height and which she had not returned. The letter repeated Reed’s decision to opt to see a respondent selected doctor. The letter stated that Reed had been trying to contact Height but had received no response and

also requested that Reed be put back to work for 30 hours of work per week, consistent with Dr. Wilson's ordered work restrictions. Height did not respond to Lawson's letter nor did she return Lawson's telephone calls.

37. On September 25, 2006, respondent supervisor Matt Spain sent Erinn Height an email which stated that Reed had called him claiming that she had been trying to contact Height for three weeks and Height would not return her calls. The same day, Mike Lagomarsino, business agent for Teamsters' Local 856, left a voicemail with Height saying that Reed had called him complaining that Height was not returning her telephone calls. On that same date, Height prepared an internal memo "to file" in which she stated that Reed had neither called her directly nor left any voicemails for her.

38. On September 27, 2006 Height called Reed to tell her that she had scheduled an October 12, 2006 appointment for her with a psychologist, Loretta Fox, Ph.D., QME, with the Barrington Psychiatric Center. Height followed up with a September 29, 2006 confirming letter. Thereafter, Reed left several messages for Height to ask for more details about the appointment. Height did not return any of Reed's calls.

39. On September 29, 2006, Height sent Dr. Fox a letter with a number of questions and instructions for Dr. Fox to complete as part of the psychological evaluation of Reed. Height asked Dr. Fox to complete respondent's standard Accommodation Request Form, the same respondent form previously completed by Dr. Wilson. Height included a job description for a respondent Customer Service Representative. In addition, Height posed a series of questions for Dr. Fox to answer about Reed's medical condition, which included Dr. Fox's opinion of the duration of Reed's medical condition, a reasonable period for re-evaluation of the condition, whether Reed could work any time of day, and whether there were any other accommodations that could be provided to manage Reed's stress level rather than reduced work hours. Height did not ask Dr. Fox any questions about Reed's ability, with her mental condition, to interact with customers or colleagues.

40. On October 3, 2006, Teamsters' Union counsel Donald Lawson left Height a voicemail acknowledging that Reed had agreed to undergo the medical examination with the company-appointed psychologist and requesting that she be returned to work as soon as possible at 30 hours per week. At 7:40 p.m. that evening, Height called Reed, left her a voicemail and the next day sent a confirming letter stating she had tried to call Reed but received no response.

41. On October 5, 2006, at 12:28 p.m., Height left a voicemail with Donald Lawson, saying that she was returning his call, her only response to any of his calls.

42. On October 5, 2006, Reed called Matt Spain to report that she had run out of medication since she was no longer receiving medical benefits from respondent while she was on unpaid leave. As a result, Reed told Spain that she had postponed the appointment with Dr. Fox because she did not believe that she would be able to answer Dr. Fox's

questions, without her medications for her depression. That same day, Spain called Height and reported Reed's conversation with him to Height.

43. On October 9, 2006, Height wrote Reed a letter that respondent was still paying Reed's medical benefits. This was the first time that anyone from respondent had informed Reed that her health benefits were, in fact, being paid.

44. On October 10, 2006, Matt Spain called Reed in response to two of her voicemail messages. Reed had complained to Spain that Height never answered her phone, that Reed could not understand why her accommodation request was taking so long, and that the delay was "causing her financial problems because she had not been working." In addition, that day, Reed left two voicemail messages for Height asking her to accept Reed's calls.

45. Also on October 10, 2006, Dr. Matthew Ryan, the scheduling psychologist at the Barrington Psychiatric Center, notified Height that Reed's appointment with Dr. Fox had been rescheduled for October 20, 2006. On October 12, 2006, Height called Reed and gave her the new appointment information, then sent Reed a confirming letter.

46. On October 20, 2006, Reed met with Dr. Fox of the Barrington Psychiatric Center. Dr. Fox examined Reed for approximately four hours, asking about events from her past and her present mental state. After evaluating Reed, Dr. Fox filled out an Accommodation Request Form for submission to respondent stating that Reed should work no more than six hours per day and needed brief five minute breaks each hour. Dr. Fox also stated that this reduction in hours should continue for six to eight months and then be reevaluated. On November 1, 2006, Dr. Fox sent her report, including the Accommodation Request Form, to Height, who received it on November 3, 2006.

47. Reed found speaking to Dr. Fox about her personal and psychiatric history to be very painful, feeling as though she had "gone to the hospital, opened up her wound and then walked out the door." Extremely upset with telling her personal history to Dr. Fox, Reed left her appointment with an intensely heightened anxiety level. Her emotional state "over the top," Reed was in a car accident within two miles of Dr. Fox's office.

48. On November 2, 2006, Teamsters' Union's Donald Lawson sent Height a letter once again requesting information about Reed's return to work. Height did not respond to Lawson's letter for eight days.

49. On November 6, 2006, Height informed her supervisor, Christopher Rolletta, that she had received Dr. Fox's report and had emailed the report to respondent's in-house counsel, Christine Connolly Dixler, in New Jersey. Height discussed the report with Dixler and discussed what steps to take.

50. On November 7, 2006, Height wrote to Reed advising her that respondent was reviewing Dr. Fox's report and would contact Reed the following week. On November 10,

2006, Height wrote to Donald Lawson informing him that respondent was currently reviewing Dr. Fox's report.

51. On November 13, 2006, John Shepardson, respondent's regional manager for Northern California, sent Matt Spain and Erinn Height an e-mail informing them that respondent was going to return Reed to work for four hours a day, four days a week. The e-mail read in part, "We are going to bring her back but for 4 hours/day, 4 days a week to cover the midday peaks Thu, Fri, Sat and Sun [sic] to comply with ADA.² This will help for the midday rush. Erinn [Height] and I have a meeting scheduled with her this Thursday at 12:30 PM as we are getting pressure now that her [sic] [Reed] we have received her medical findings."

52. On November 14, 2006, Height called Reed to set up the meeting with John Shepardson for Thursday, November 16, 2006. On November 16, 2006, Reed, accompanied by Lawson, met with Height, Shepardson, Constance Stephens, respondent's San Francisco Airport Manager, and, via telephone, Christine Connolly Dixler, in-house counsel. Stephens told Reed that the schedule available for her to work based on respondent's operational needs and Reed's restrictions was the following: Saturdays and Sundays from 9 a.m. to 1 p.m. and Mondays and Tuesdays from 10 a.m. to 2 p.m., a total of 16 hours per week. The record did not indicate why the days offered to Reed varied from those announced in John Shepardson's previous day email. Height was aware that Reed was requesting a 30 hour per week schedule, and assumed that Reed would have "concerns" about the offered reduced schedule because it did not give her the hours that she had requested.

53. Being placed on a four hours per day, four days a week schedule, made Reed a part-time employee and eliminated her ability to "bump," or displace, another employee in the event of a layoff. Because of seasonal slowdown of business, in November 2006, respondent was in the process of closing two facilities in San Francisco and planning layoffs the next month. Thus, Reed's new reduced schedule put her in danger of being laid off when the two San Francisco offices were closed. Further, on the reduced, 16-hour a week schedule, Reed also would no longer qualify for medical benefits.

54. At the November 14, 2006 meeting, Reed objected to the 16-hour work schedule because both she and her doctor had requested a 30-hour work week and because she was concerned about the impact of the reduced-hour schedule on her seniority, with a layoff pending, and on her medical benefits. Dixler assured Reed that the reduced schedule would not affect her employment seniority. Dixler told Reed she was being "taken out of the shift bid" for the company to accommodate her request. Reed was "disappointed and frustrated," noting to the respondent representatives at the meeting that this would result in a loss of medical benefits and thus, she would no longer be able to get the medications she needed.

² The Americans with Disabilities Act of 1990 (Pub.L. No. 101-336) (Jul. 26, 1990) 104 Stat. 328, 42 U.S.C. § 12101, et seq. (ADA), as amended, ADA Amendments Act of 2008 (Pub.L. No. 110-325) (Sep. 25, 2008) 122 Stat. 3554 (ADAAA).

Despite Reed's objections and concerns, at no point did anyone from respondent considered offering Reed more hours. Feeling she had no choice, Reed accepted respondent's terms because she needed the job, having been on unpaid leave status since June 19, 2006.

55. During Reed's unpaid leave, respondent never raised either with the Teamsters' Union or with Reed any claim that her reasonable accommodation request would cause the company undue hardship if granted.

56. On November 18, 2006, Reed returned to respondent, working the part-time four hour per day/16-hour per week schedule, earning \$11.28 per hour.

57. On December 11, 2006, Mike Lagomarsino, Teamsters' Local 856's business representative, filed a grievance on Reed's behalf stating that respondent should have accommodated Reed's reasonable accommodation request for a modified work schedule of six hours per day, five days a week. The Union asserted that respondent had not demonstrated that the accommodation would cause respondent hardship, that the Union's January 2005 Letter of Understanding stated that such a reduced work schedule had been accommodated in the past and that this Letter of Understanding did not in any way preclude respondent from accommodating Reed's request. The letter also stated that the Union considered Reed to be a full-time employee whose current modified work schedule was a result of an accommodation due to a disability and as such, her full-time seniority standing must be maintained. Further, Lagomarsino asserted that Reed's seniority standing should be based on her original hire date.

58. On December 18, 2006, respondent laid off Reed, effective December 31, 2006, stating that it did not have enough work for her.

59. On December 22, 2006, Height wrote to Lagomarsino informing him that respondent was denying the Teamster's December 11, 2006 grievance filed on Reed's behalf.

Reed's Other Leaves and Reduced Work Schedules

60. In addition to leave or reduced work schedule requests in the past requested by Reed's mental health professionals, Reed had taken leave or worked six-hour days from 2003 to 2005 as detailed below. Respondent had granted each of these requests.

Date	Reason	Leave/6-hour day
1/20/03 – 2/13/03	Neck and shoulder injury	Six hour day
2/14/03 – 3/30/03	Neck and shoulder injury	Leave
3/31/03 – 6/30/04	Neck and shoulder injury	Six hour day
8/30/04 – 1/4/05	Abdominal surgery	Leave
1/5/05 – 7/28/05	Adhesive capsulitis	Leave
7/29/05 – 9/30/05	Adhesive capsulitis	Six hour day

61. Respondent's business was cyclical. In the spring, business increased, while summer was the busiest time of year. Business began to diminish after Labor Day and was at its slowest point during winter. During this slow period each year, the company generally offered employees voluntary time off without pay or "VTO" so that it would not have to lay off employees. Many employees agreed to take VTO, especially around the winter holidays.

62. On October 20, 2005, Reed accepted respondent's offer to take VTO beginning October 24, 2005, with a scheduled return date of January 5, 2006. Respondent then extended the VTO through March 1, 2006. Reed returned to work two times during this period, however, when respondent's business increased: from November 10, 2005 to December 16, 2005, and then again on a permanent basis on February 20, 2006. After February 20, 2006, Reed returned to work on a full time, eight-hour day basis.

Reduced Work Schedules for Other Employees

63. During the entire period Reed had been seeking accommodation, from June 19, 2006 through November 18, 2006, Sandra Ann Ruiz, another Customer Service Representative working with Reed at San Francisco airport, worked a six-hour shift for respondent. Ruiz had kept that six-hour shift schedule for 10 years, an accommodation granted to her after she sustained an on-the-job physical injury. Cassandra Shoars, another respondent Customer Service Representative, also worked six hours a day at her own request as a result of an industrial injury. Both of these employees received medical benefits with their 30-hour per week schedules.

Reed's Earnings

64. As a Customer Service Representative, Reed earned the following base pay during the relevant time periods noted below:

<u>Date</u>	<u>Rate of Pay</u>
March 4, 2005 – October 28, 2005	\$10.98 per hour
October 28, 2005 – June 23, 2006	\$11.13 per hour
November 18, 2006 – December 31, 2006	\$11.28 per hour

In addition, Reed earned the following commissions based on her sales to customers of rental car insurance, car upgrades, and gasoline, paid on the date indicated, and accrued on sales in the prior month or months:

<u>Date of Payment</u>	<u>Commission Paid</u>
09/16/05:	\$1,368.47
10/14/05:	\$533.77
11/23/05:	\$1,159.17
12/23/05:	\$715.68
01/20/06:	\$586.98
02/17/06:	\$.50

03/17/06:	\$42.74
04/14/06:	\$682.74
05/26/06:	\$528.04
06/23/06:	\$1,650.93
07/21/06:	\$2,237.88
08/18/06:	\$315.11

65. Reed's depression was greatly exacerbated during the time she was placed on unpaid leave from June through November 2006. She felt helpless, fearful, aggravated, humiliated and that there was no justice for her. Reed believed that Height and respondent had no regard for how Reed was to pay her bills without her income from the company, and that Height totally disregarded her as a person, like Reed "wasn't even a human being. She treated me like I had – like I could say it was almost like she was raping me. That's how bad I felt. I felt like I was being raped." To pay her bills while she was on unpaid leave, Reed refinanced her house, increasing her anxiety and distress. Stressed greatly by respondent's treatment of her and her financial situation, Reed had suicidal thoughts.

66. Reed's family corroborated Reed's emotional distress resulting from being denied reasonable accommodation for the period she was on involuntary unpaid leave from June to November 2006. Reed's son, Michael Anthony Pickney, noticed that Reed's demeanor was different during this time – she was very depressed, distant, and irritable. Although Reed had previously taken her grandchildren on field trips, as her depression deepened, Reed did not want to take the children out anymore. While on leave, Reed told Pickney that she did not believe that respondent was treating her fairly, did not know what she was going to do since respondent was not accommodating her, and the unresolved situation really bothered her.

67. Latoya Monique Ferguson, Reed's daughter-in-law, with whom Reed talked daily, described Reed as "stressed, sick, not feeling well, and sad" during the period she was on unpaid leave in 2006. Ferguson said Reed became a "hermit" during this time, always wanting to sleep or not be bothered by anybody.

DETERMINATION OF ISSUES

Liability

The DFEH asserts that complainant Eleanor Reed's had several disabilities, major depression and PTSD, known to respondent. The DFEH asserts that respondent failed to reasonably accommodate Reed's disabilities; failed to engage in a timely, good faith, interactive process regarding reasonable accommodation of her disabilities; made unlawful inquiries about Reed's disabilities; failed to take all reasonable steps necessary to prevent discrimination from occurring; and treated Reed differently than other similarly situated employees in the terms, conditions and privileges of her employment. The DFEH asserts

that this conduct violates, respectively, Government Code section 12940, subdivisions (m), (n), (f), (k), and (a).

A. Whether Reed Had Mental Disabilities

The DFEH asserts that complainant Eleanor Reed's had major depression and PTSD, mental disabilities under the FEHA. Respondent does not dispute that complainant has these conditions, that they are mental disabilities or that they were known to respondent at the time of Reed's accommodation request.

The evidence established that Reed's depression and PTSD are mental conditions which affected her interpersonal relationships with her co-workers and supervisors at work. Because Reed's depression and PTSD affected a major life activity, working, both are "mental disabilities" under the FEHA. (Gov. Code, §§ 12926, subd. (i) & 12926.1, subd. (c), Cal. Code Regs., tit. 2, § 7293.6, subd. (f); *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256 [PTSD]; *Auburn Woods I Homeowners Ass'n v. Fair Empl. & Hous. Com.* (2004) 121 Cal.App.4th 1578, 1593-1593 [depression].)

The evidence also established that the limitations of Reed's mental disabilities, her need to work a reduced work schedule, were "known" to her employer. Respondent does not dispute this. On June 19, 2006, Reed gave her supervisor Matt Spain a note from Dr. Wilson which restricted her work hours to six hours per day and told Spain that this restriction was because she suffered from depression. In addition, Dr. Wilson's Accommodation Request Form indicated that Reed had both major depression and PTSD which limited the number of hours that she could work. (*Taylor v. Principal Financial Group, Inc.* (5th Cir. 1996) 93 F.3d 155, 164 [employer required to accommodate known limitations flowing from a disability]; *Taylor v. Phoenixville School Dist.* (3rd Cir. 1999) 184 F.3d 296, 314.)³

B. Reasonable Accommodation (Gov. Code § 12940, subd. (m))

The DFEH asserts that respondent denied reasonable accommodation to Reed, thereby violating Government Code section 12940, subdivision (m). In particular, the DFEH asserts that respondent failed to reasonably accommodate Reed's disabilities, major depression and PTSD, in a timely manner by forcing her to take five months of involuntary, unpaid leave. Further, the DFEH asserts, when respondent finally did allow Reed to return to work, the accommodation it offered her—a part-time position without health benefits or the ability to "bump" less senior employees during a layoff—was not a reasonable accommodation.

Respondent does not dispute that Reed needed reasonable accommodation for her mental disabilities. Respondent argues, however, that it had repeatedly accommodated Reed

³ Given the similarity of the goals shared by the FEHA and the ADA, it is appropriate to examine federal guidelines and precedent for assistance in construing the FEHA, as the federal law provides a "floor of protection" for persons with disabilities. (Gov. Code § 12926.1, subd. (a).)

in the past and, after Reed's June 2006 request, reasonably accommodated Reed by allowing her to return to work in November 2006. Respondent argues that it is, therefore, not liable for a violation of Government Code section 12940, subdivision (m). Respondent asserts that the five month delay in offering Reed this accommodation was due to the interactive process and that once it was established to its satisfaction that Reed could perform the essential functions of her job, she was reasonably accommodated by being scheduled according to seasonal demand.

Under the FEHA, it is unlawful for an employer to fail to make reasonable accommodation for the known physical or mental disability of an employee unless doing so would pose an undue hardship on the employer. The DFEH must establish, by a preponderance of the evidence, that the employee has a disability covered by the FEHA, that the employee can perform the essential functions of the job with or without reasonable accommodation, and that the employer failed to reasonably accommodate the employee's disability. (Gov. Code § 12940, subs. (a) & (m); Cal. Code Regs., tit. 2, § 7293.9; *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1192.) Further, the DFEH must demonstrate that the employer is aware of the employee's disability and limitations arising from that disability. (*Prilliman v. United Airlines, Inc.* (1997) 53 Cal.App.4th 935, 951-952, 954 *Taylor v. Phoenixville School Dist.*, *supra*, 184 F.3d at p. 313; *Smith v. Midland Brake, Inc.* (10th Cir. 1999) 180 F.3d 1154, 1171-1172.) If more than one accommodation is effective, "the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations." (ADA Regulations and Appendix at 29 C.F.R. pt. 1630.9, app. § 1630.9 (July 1, 2009).)

It is the employer's burden to demonstrate that the proposed accommodation would pose an undue hardship or that the employee cannot perform the essential job functions with or without reasonable accommodation. (Cal. Code Regs., tit. 2, § 7293.9; *Dept. Fair Empl. & Hous. v. California State University, Sacramento* (May 20, 1988) No. 88-08, FEHC Precedential Decs. 1988-89, CEB 3, p. 19 [1988 WL 242638 (Cal.F.E.H.C.)]; *Dept. Fair Empl. & Hous. v. Kingsburg Cotton Oil Co.* (Dec. 7, 1984) No. 84-30, FEHC Precedential Decs. 1984-85, CEB 11, p. 31 [1984 WL 54310 (Cal.F.E.H.C.)].) The duty of reasonable accommodation is broadly defined to include, in relevant part, part-time or modified work schedules. (Gov. Code, § 12926, subd. (n)(2).)

In our March 30, 2010, Notice of Opportunity for Further Argument (NOFA), we asked the parties to address prior efforts by respondent to accommodate Reed and the reasons why accommodation was given. We also asked for arguments whether accommodation of a reduced work schedule of six hours per day for one year was reasonable under the circumstances. In addition, we asked the parties to address certain matters raised in respondent's closing hearing brief, including allegations that Reed was working part-time as a real estate agent and had hit a co-worker in the past; and whether her mental disabilities might have prevented her from performing the essential functions of her job of social interactions with customers, co-workers and supervisors.

In their NOFA briefing, both the DFEH and respondent acknowledge that respondent had repeatedly accommodated, without incident, Reed's requests both for leave and to work six-hour days, from 2001 through 2005 for her prior physical and mental conditions. Respondent was unable to provide the specific reason for many of these accommodation requests, including all that were made by Reed's Kaiser mental health professionals. During that time period, respondent had granted all requests without further questioning. Once respondent became aware that the June 2006 request was for Reed's mental disabilities, however, company officials, including Height and Christopher Rolletta, wanted more information that six hours was a reasonable accommodation that would allow Reed to perform the essential functions of her job and that the accommodation was necessary for one year. Thus, the company sent Reed home until it could obtain the information that it asserted that it needed.

Respondent asked Reed's doctor to fill out an Accommodation Request Form to provide it further information about Reed's six-hour request. The Form asked Reed's doctor to identify what accommodations would enable Reed to perform the tasks that her mental disabilities precluded her from performing and whether and when Reed was likely to recover sufficiently to perform her job duties without accommodation or restriction. Dr. Wilson indicated that Reed's PTSD lead to avoidance of social interactions with significant impact for her, that Reed could perform her duties but should not work more than six hours to avoid flare up of her PTSD symptoms, his only recommended accommodation. Dr. Wilson also indicated that working more than six hours significantly increased Reed's stress levels, and that she was likely to need this accommodation for the "foreseeable future."

The record did not indicate that Reed had ever had any problems with her rental customers when Reed worked either an eight hour or a six-hour day. Indeed, her commissions evidence that she was successful in her interactions with selling to them. In the two months prior to involuntary unpaid leave, Reed earned a total of \$3,888.81 in commissions for selling car upgrades, gasoline, and rental car insurance to customers.

In its NOFA brief, respondent argues that it had concerns about Reed's interactions with her co-workers and supervisors, citing allegations from 2004 that Reed had struck a co-worker, and that this justified its delay in immediately granting Reed's accommodation request. Yet, the hearing record contradicts this assertion. Both Height and Christopher Rolletta testified that prior disciplinary matters, including allegations that Reed had struck a co-worker, did not factor into respondent's evaluation of Reed's reasonable accommodation request. We note that any allegations of past co-worker complaints were hearsay; respondent did not call any of these co-workers to testify. Further, we note that respondent continued to employ Reed for two years after this incident, allowing her to work with customers and the same co-workers, without apparent concern for the customers' or co-workers' safety.

Respondent also argues that based on Reed's prior conduct and the fact that Dr. Wilson requested a six hour reduction for one year; it had reason to doubt the veracity of Reed's accommodation request. Yet, once respondent received Dr. Wilson's

Accommodation Request Form, Height testified that, to the contrary, she had no reason to doubt the veracity of Dr. Wilson's diagnosis or the recommended accommodation.

In asking for her shifts to be reduced by two hours daily, Reed was seeking a modified work schedule, a form of accommodation the FEHA expressly provides may be a reasonable accommodation. (Gov. Code, § 12926, subd. (n)(2).) The FEHA and the Commission's regulations "clearly contemplate not only that employers remove obstacles that are in the way of the progress" of individuals with disabilities, but also that employers "actively restructure their business in order to accommodate the needs" of their employees with disabilities. (*Prilliman v. United Airlines, Inc.*, *supra*, 53 Cal.App.4th at p. 947.)

In June 2006 when Reed submitted her request for accommodation, instead of removing obstacles, respondent spent five months placing more obstacles in Reed's path. And, when respondent belatedly offered Reed an accommodation so she could return to work, it made no attempt to determine first, whether it could have offered her the requested accommodation without undue hardship and instead offered her a limited 16 hour per week schedule, ostensibly to meet its "business needs." Respondent assumed that Reed would have concerns about this limited schedule, finding it unacceptable because she would lose her medical benefits and was guaranteed, as a 16 hour per week employee, to be laid off without the ability to bump a less senior employee once layoffs began.⁴ An involuntary accommodation that denies an employee "a benefit of employment" is discriminatory based on disability and thus is not "reasonable." (Cal. Code Regs., tit. 2, § 7293.7.)⁵

In its closing brief, respondent argues that in November 2006, when it finally accommodated Reed, the offered 16 hour workweek was a reasonable accommodation because November was a slow business period, two San Francisco locations were imminently closing and the four hour per day schedule thus best fit its business needs. Yet

⁴ Neither party disputes that an employee working a 16 hour week would not be entitled either to health benefits or to bump a less senior employee in case of a layoff.

⁵ The evidence at hearing established that, based on Reed's seniority, she would have been scheduled for layoff from her position as a Customer Service Representative when respondent began major reductions in December 2006. Nonetheless, if Reed had been granted her requested accommodation to work a six-hour day and had retained her earned seniority rights, the DFEH argues that under the terms of the Teamsters' contract, she would still have had "bumping" rights to displace an employee with lesser seniority who worked as a "Rapid Return Agent," an employee responsible for returning rental cars. Respondent disputes the DFEH's interpretation, arguing that under the terms of the Teamsters' contract, only full-time 40 hour per week employees could bump co-workers with less seniority.

Determining whether Reed would have had such bumping rights requires us to interpret terms of the collective bargaining agreement between respondent and Teamsters' Local 856, which we cannot do. Section 301(a) of the Labor Management Relations Act of 1947 ("LMRA," 29 U.S.C. § 185(a)) preempts a state adjudicative tribunal's interpretation of a collective bargaining agreement. (See *Franchise Tax Board v. Construction Laborers Vacation Trust for S. Cal.* (1983) 463 U.S. 1, 23 [Federal law governs suits for breach of a collective bargaining agreement ("CBA") under the LMRA, which therefore preempts any state cause of action for breach of the CBA.])

arguing that a four hour schedule “best fit” respondent’s “business needs” does not establish that granting Reed this accommodation would have caused the company undue hardship. And, respondent’s “business needs” argument is questionable given that the company offered Reed a different schedule at its November 16, 2006 meeting than the “business needs peak times” identified in an internal management memorandum the previous day. No explanation was given for this contradiction.

Government Code section 12926, subdivision (s), defines undue hardship and provides a list of factors for employers to establish that a requested accommodation would cause an employer undue hardship.⁶ Respondent presented no evidence utilizing these factors to establish that granting Reed a 30 hour schedule, as requested, would have caused it undue hardship and indeed, acknowledged in its closing brief that it was not asserting undue hardship.

Respondent also argues that the testimony of Dr. Paul Berg, a psychologist it retained for the hearing in this matter, who disagreed with both Dr. Wilson’s and Dr. Fox’s recommended accommodations for Reed’s mental disabilities, establishes that the requested accommodation of a 30-hour work week was not medically sound. We note that Dr. Berg never examined Reed. In contrast, the evidence established that in 2006, when respondent was considering Reed’s accommodation request, both Dr. Wilson, who was Reed’s treating physician for five years, and Dr. Fox, a psychologist whom respondent selected and who examined Reed for four hours, were in agreement that the six-hour day, 30-hour week was a medically necessary accommodation for Reed’s mental disabilities.

In sum, we find that placing Reed on five months of unpaid leave, then making a unilateral decision to return her to a 16-hour schedule which cut her pay and exposed her to layoff while rejecting, without explanation, Reed’s, her doctor’s and the company doctor’s reasonable accommodation request, violated respondent’s duty to reasonably accommodate Reed. Thus, we find that the DFEH established respondent violated Government Code section 12940, subdivision (m).

⁶ Government Code section 12926, subdivision (s), provides:

“Undue hardship” means an action requiring significant difficulty or expense, when considered in light of the following factors:

- (1) The nature and cost of the accommodation needed.
- (2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility.
- (3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities.
- (4) The type of operations, including the composition, structure, and functions of the workforce of the entity.
- (5) The geographic separateness, administrative, or fiscal relationship of the facility or facilities.

C. Failure to Engage in the Interactive Process (Gov. Code, § 12940, subd. (n))

The DFEH also charges that respondent failed to engage in the interactive process, in violation of Government Code section 12940, subdivision (n). Respondent argues that Reed's failure to allow access to her doctor or to examine her medical records was principally responsible for any breakdown in the interactive process.

The FEHA provides that it is an unlawful employment practice for an employer "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (Gov. Code, § 12940, subd. (n), *Jensen v. Wells Fargo Bank, supra*, 85 Cal.App.4th at pp. 262-263.) An employer's obligation to begin an interactive process is triggered once the employee requests reasonable accommodation. (Gov. Code, § 12940, subd. (n), *Jensen v. Wells Fargo Bank, supra*, 85 Cal.App.4th at p. 261, citing *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105.) The employee must cooperate with their employer in "good faith" and provide the employer with all relevant information relating to their disability and possible accommodation. (*Jensen v. Wells Fargo Bank, supra*, 85 Cal.App.4th at p. 266.)

The evidence established that the five months delay from Reed's initial request to when respondent finally offered her an accommodation, was primarily due to respondent, not Reed. Any delay on the part of Reed, the record established, were because Height refused to return Reed's telephone calls and also did not inform her for several months that Reed was, in fact, still receiving medical benefits.

For example, during this period of delay, Height repeatedly failed to communicate with Reed or her union representative regarding her reasonable accommodation request, what steps were being taken to consider it or whether she was covered by respondent's medical benefits. While Height denies that she failed to communicate with Reed or Donald Lawson, the weight of the evidence at hearing establishes otherwise. Reed credibly testified that she repeatedly called Height regarding her accommodation request and medical benefits and Height repeatedly failed to return her calls. Reed contemporaneously complained to Reed's supervisor, Matt Spain, and to Teamsters' Union business agent, Mike Lagomarsino, about Height not returning her calls.

Adding credence to Reed's complaints is similar credible testimony from Donald Lawson, who testified that he repeatedly called Height without responses from her, and documented her failures to return his calls in correspondence that he sent her. To believe Height, then, one would have to disbelieve both Reed and Lawson, believe that both Reed and Lawson sent false letters complaining about Height's failure to return their calls over a period of months, and to believe that Reed contemporaneously lied about Height's lack of communication with her both to Spain and to Lagomarsino. Contrary to Height's denials, the totality of the evidence at hearing establishes that it was Height who consistently and

inexcusably failed to communicate with Reed and her union representative, Donald Lawson. Respondent has no legitimate excuse for these gaps in communication in the interactive process. Any party that fails to communicate is acting in bad faith. (*Beck v. Univ. of Wisconsin Bd. of Regents* (7th Cir. 1996) 75 F.3d 1130, 1135.)

Height took ten days to tell Reed initially that her first doctor's note was inadequate, a month to tell her that the second Reasonable Accommodation form was still inadequate, a month to set up a doctor's visit, and two weeks to offer her less hours than prescribed by both Dr. Wilson and Dr. Fox.⁷ Making these delays even more difficult to understand is the fact that respondent had provided Reed with the precise accommodation that she had requested on numerous occasions in prior years without any apparent deleterious effect on the company's productivity, morale or business operations. Respondent's gaps in communication with Reed were a breakdown in the interactive process. Respondent's communications were not "timely."⁸

Further, for the five months of Reed's unpaid leave, respondent did not talk with Reed either to ascertain whether her requested accommodation was reasonable or to determine if there were any other alternatives. And, at the November 16, 2006 meeting, respondent had already determined what hours it would offer Reed. Reed was given no choice or say in the matter. Indeed, respondent assumed that Reed would have concerns about the diminished hours, but gave no consideration to altering its proposal. Thus, respondent's process for determining reasonable accommodation for Reed was neither "interactive" nor done in "good faith" within the meaning of the FEHA.⁹

We find, based on this record, that the DFEH established that respondent failed to engage in a timely, interactive dialogue to determine effective reasonable accommodation for Reed's mental disabilities and thus violated Government Code section 12940, subdivision (n).

⁷ Height asserted that the initial 10 day delay occurred because she needed to consult with respondent's counsel concerning the sufficiency of the Accommodation Request Form, she had trouble reaching counsel, and that multiple conversations with counsel took place. Yet no time needed to consult counsel can explain the gaps in communication where respondent failed to interact with Reed over a course of five months.

⁸ Cf. *Krocka v. Riegler* (N.D.Ill. 1997) 958 F.Supp. 1333, 1342 ["[A]n unreasonable [eight month] delay in implementing a "reasonable accommodation" can constitute a discriminatory act."].

⁹ "Employers can show their good faith in a number of ways, such as taking steps like the following: meet with the employee who requests an accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered the employee's request, and offer and discuss available alternatives when the request is too burdensome." These steps are consistent with the recommendations in the EEOC's interpretive guideline. See 29 C.F.R. Pt. 1630, App. § 1630.9 at 359-61." (*Taylor v. Phoenixville School District*, *supra*, 184 F.3d at p. 317.)

D. Unlawful Inquiries About Complainant's Disabilities (Gov. Code § 12940, subd. (f))

The DFEH alleges that respondent unlawfully demanded in its initial Accommodation Request Form that Reed permit access to her psychiatric medical records and permit a respondent representative to speak with her doctor, in violation of Government Code section 12940, subdivision (f). Further, DFEH alleges that after Reed refused respondent access to her medical records and to her doctor, she nonetheless provided the company with a completed, sufficient Accommodation Request Form, which should have ended any need for further medical information. The DFEH asserts that respondent again violated Government Code section 12940, subdivision (f), when, notwithstanding the completed Accommodation Request Form, the company demanded that Reed either permit access to her psychiatric medical records or, instead, be subjected to a medical examination by a company-retained doctor.

Respondent responds that it asked for medical information relevant to understand whether Reed could perform the essential functions of the job, interacting with rental car customers, with or without reasonable accommodation and, further, to assess whether Reed's request for accommodation was an "honest one."

Government Code section 12940, subdivisions (f)(1) and (f)(2), provide, in relevant part, that an employer may not require or make any medical or psychological examination or inquiry regarding the nature or severity of a disability except where that inquiry is job-related and consistent with business necessity.

The DFEH concedes that an employer may verify that the employee has a disability and that an accommodation is needed to perform the essential functions of the position. Nonetheless, the DFEH asserts that an employer cannot request access to an employee's complete psychiatric medical history or to the employee's doctor as part of the initial accommodation request, prior to a showing that the initial accommodation request was insufficient. And, in this case, the DFEH argues, Dr. Wilson's answers on respondent's Accommodation Request Form were sufficient and provided the company with all the information that it requested. Respondent argues that it asked for "pertinent" records, not "complete" records, as the DFEH asserts, and that the vague answers that it received from Dr. Wilson justified its request that Reed be examined by a company-provided mental health professional.

Under specified circumstances, an employer may ask an employee for documentation when the employee requests a reasonable accommodation. "[W]hen the disability or need for the accommodation is not known or obvious, it is job-related and consistent with business necessity for an employer to ask an employee for reasonable documentation" about the functional limitations of an employee's disability that require reasonable accommodation. (EEOC Notice No. 915.002, 7/27/00, "Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA", 2 EEOC Compl. Man. (CCH) ¶6910 (2000), referred to hereafter as "EEOC Enforcement Guidance".)

Although an employer may require the employee to submit documentation to substantiate that the employee has limitations from a disability and needs the requested accommodation, an employer cannot ask for unrelated documentation, including an employee's complete medical records, because those records are likely to contain information unrelated to the disability and the need for accommodation. For proffered medical documentation to be "sufficient," it must describe the limitations of the disability, how those limitations affect the employee's ability to perform their essential job duties, and how long the impairment will last.¹⁰ And, if an employee provides insufficient documentation in response to the employer's initial request, the burden is on the employer to explain why the documentation is insufficient and allow the employee an opportunity to provide the missing information "in a timely manner" before rejecting the proposed accommodation or imposing additional conditions such as requiring that an employee be examined by a company-provided doctor.¹¹

The Accommodation Request Form, on its face, required a respondent employee requesting accommodation to allow access to the employee's "pertinent" medical records and to allow respondent access to the employee's doctor regardless of whether the doctor provided sufficient information. The form was impermissibly overbroad, as it required information that was not needed if the employee's doctor provided sufficient information. Further, seeking permission to view "pertinent" information is impermissibly vague, particularly in mental disability cases. "Disabled employees, especially those with psychiatric disabilities, may have good reasons for not wanting to reveal unnecessarily every detail of their medical records because much of the information may be irrelevant to identifying and justifying accommodations, could be embarrassing, and might actually exacerbate workplace prejudice." (*Taylor v. Phoenixville School Dist.*, *supra*, 184 F.3d at p. 315.) Revealing such personal and potentially embarrassing information was a fear that

¹⁰ Cf. EEOC Enforcement Guidance, *supra*, at Q10. Note that under California law, Civil Code section 56.10 restricts a health care provider's ability to release information about the employee's diagnosis, concentrating instead on the limitations of that diagnosis. Similarly, the Commission's regulations interpreting the California Family Rights Act (CFRA), Government Code section 12945.2, provide that an employer cannot ask for the diagnosis of an employee's serious health condition necessitating taking a CFRA leave, but only whether that serious health condition requires such a leave. (See Cal. Code Regs., tit. 2, §§ 7297.4, subd. (b)(2)(A)(1), and 7297.11.)

¹¹ Cf. EEOC Enforcement Guidance, *supra*, at Q11. "May an employer require an employee to go to a health care professional of the employer's (rather than the employee's) choice when the employee requests a reasonable accommodation? The ADA does not prevent an employer from requiring an employee to go to an appropriate health care professional of the employer's choice if the employee provides insufficient documentation from his/her treating physician (or other health care professional) to substantiate that s/he has an ADA disability and needs a reasonable accommodation. However, if an employee provides insufficient documentation in response to the employer's initial request, the employer should explain why the documentation is insufficient and allow the employee an opportunity to provide the missing information in a timely manner."

Under Civil Code section 56.10, subdivision (c)(8)(B), the company's doctor is restricted to describing the "functional limitations of the patient that may entitle the patient to leave from work for medical reasons or limit the patient's fitness to perform his or her present employment, provided that no statement of medical cause is included in the information disclosed."

Reed explicitly articulated in her testimony.¹² And, as respondent's response to Reed's divulging her mental disabilities indicates, Reed's concerns were well-founded.

Here, respondent's Accommodation Request Form's questions to Reed's psychiatrist, as answered by Dr. Wilson, provided it with the information that it needed to establish that Reed had limitations because of a mental disability and needed reasonable accommodation. Dr. Wilson provided information to respondent on the nature, severity, and duration of Reed's disabilities. Wilson stated that Reed could be able to perform her job duties as long as her work day was shortened to six hours. Express in this statement was the medical determination that Reed was able to perform all of her job functions as long as she worked the prescribed reduced schedule. The accuracy of this evaluation was substantiated by the fact that periodically in the prior five years, Reed had worked a reduced work schedule and, with this reduced schedule, Reed had successfully performed all of her job duties working with rental car customers.

Nevertheless, after Reed submitted the Accommodation Request Form, Height testified that she still had questions about how Reed's disability would affect her ability to do her job. Height noted that the form stated Reed's disability led to "the avoidance of social interaction with significant impact for her" and yet most of Reed's job duties involved social interaction with rental car customers. Height also was concerned about Reed's interactions with her co-workers and supervisors. Thus, respondent asserts, Height was justified in requesting more information to ascertain whether Reed could perform this essential function of her job. Further, Height and Rolletta were also concerned that the request was for one year.

While the ambiguity of the "social interactions" term might have made further inquiry about it to Reed reasonable, no one at respondent explained to Reed why her doctor's documentation was insufficient or provided her with the opportunity to submit supplemental documentation about her request. Reed testified that she would have submitted additional questions to Dr. Wilson if respondent had explained the specific deficiencies in her documentation or if it had asked for clarification of the original documentation. Dr. Wilson also testified that he would have willingly supplied any additional documentation requested. Instead, respondent demanded that Reed either allow access to her psychiatric medical records or agree to an examination by a mental health professional retained by respondent.

At hearing, respondent, through Height, conceded that it believed that Dr. Wilson and Reed submitted the documentation in good faith, that the company did not question Dr. Wilson's expertise to render his opinion about reasonable accommodation, and that Height did not know if Reed's medical records would contain the answers that she needed

¹² The parties' dispute concerning whether the requested records were Reed's "complete" psychiatric medical records, as the DFEH contends, or only the "pertinent" ones, as respondent posits, is a distinction without significance in this matter. Reed was concerned about protecting her psychiatric medical records, not her physical health history, and respondent does not dispute that it was asking for her complete psychiatric medical files.

regarding Reed's limitations. All of these admissions further support the finding that the request for Reed's psychiatric medical file was overbroad and neither job-related nor required by business necessity.

Respondent also argues that Reed had worked eight-hour days previously, without complaint, and it was concerned that she had asked for the reduction in her time to work as a real estate agent elsewhere as workplace rumors had suggested. At no time, however, did anyone from respondent ask Reed about her purported real estate business. In any event, access to Reed's psychiatric medical files or an examination by a company-provided doctor could not be expected to provide any information about Reed's rumored plans for a real estate career.

In this case, we find that respondent violated Government Code section 12940, subdivision (f), by initially requiring Reed to submit her psychiatric medical file or to allow respondent access to her doctor; and, thereafter, by not allowing Reed or her doctor the opportunity to answer respondent's further questions before insisting that Reed see its company-provided psychologist.

E. Disparate Treatment on the Basis of Disability (Gov. Code § 12940, subd. (a))

The DFEH also alleges that respondent violated Government Code section 12940, subdivision (a), by treating Reed differently than other similarly situated employees because of her disability after she submitted her request for reasonable accommodation. Our review of the record convinces us that Reed was treated differently before respondent learned that she had mental disabilities and was also treated differently from Sandra Ann Ruiz and Cassandra Shoars, two other similarly situated co-workers, who had industrial injuries.

Disparate treatment requires a showing that an employee has been singled out and treated less favorably than others similarly situated on the basis of an impermissible criterion, such as a mental disability. (See *Dept. Fair Empl. & Hous. v. Gallo Glass* (Oct. 1, 2002) No. 02-16-P [2002 WL 31520135 (Cal.F.E.H.C.)]; *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App. 4th 327, 342; *E.E.O.C. v. Metal Service Co.* (3rd Cir. 1990) 892 F.2d 341, 347; and *International Bhd. of Teamsters v. United States* (1977) 431 U.S. 324, 335-36, fn. 15.)

For five years, from 2001-2005, respondent granted every accommodation request that Reed made to the company for medical leave and shortened work weeks, including a 14 month six-hour per day reduced work schedule from March 31, 2003 through June 30, 2004. Similarly, respondent also accommodated two other employees, Sandra Ann Ruiz and Cassandra Shoars, with reduced hours necessitated by industrial injuries. Ruiz had worked this schedule for over ten years.

In contrast, when the company learned that Reed was asking for a shorter work week because of mental disabilities, in June 2006, respondent sent Reed home for an unpaid five month leave and returned her to work for fewer hours than necessitated as an accommodation for her mental disability. Even after the necessity for the reduced hours was verified not only

by Dr. Paul Wilson, but also by Dr. Loretta Fox, respondent continued to refuse to return Reed to a six-hour schedule, without showing undue hardship. Evidence that respondent treated similarly situated employees in similar circumstances more favorably than it treated Reed once it knew she had a mental disability provides evidence of unlawful discrimination. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 804.)

With this evidence, we find that the DFEH has established that respondent treated Reed differently than other similarly situated employees because of her mental disability, in violation of Government Code section 12940, subdivision (a).

F. Failure to Take All Reasonable Steps Necessary To Prevent Discrimination (Gov. Code § 12940, subd. (k))

The DFEH also charges that respondent violated the Act by failing in its affirmative duty, under Government Code section 12940, subdivision (k), to take all reasonable steps necessary to prevent discrimination from occurring. Respondent counters that the DFEH has failed to establish that respondent discriminated against Reed because of her disability and, thus, cannot establish a violation of this subdivision citing *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 28689.

The DFEH asserts that respondent failed to take all reasonable steps necessary to prevent discrimination from occurring because: 1) respondent did not have a reasonable accommodation policy and did not train its human resource employee Erinn Height in how to respond to a reasonable accommodation request; 2) respondent was unresponsive to Reed's calls about her accommodation request for five months while she was on unpaid leave as well as her inquiries about her medical benefits; and, 3) the company used an overly broad Accommodation Request Form which impermissibly asked for access to medical records and the employee's doctor.

Respondent asserts that notwithstanding the fact that it had no reasonable accommodation policy, its personnel and managers "knew" that they were to contact Human Resources when faced with an accommodation request. Yet, here, when Reed's supervisor, Matt Spain, turned Reed's accommodation request over to Erinn Height, she was untrained by respondent about how to deal with an accommodation request, and there is no evidence in the record that the company ever gave her any training. The record established that Height stalled in not responding to Reed for five months, stonewalled her telephone calls, looked for non-disability related incidents in Reed's personnel file and eventually offered her, through consultations with respondent management, but not Reed, an inadequate accommodation. In addition, respondent used, and continued to use, through the date of hearing, an Accommodation Request Form which asked for access to all pertinent medical records and the employee's doctor prior to ascertaining whether the employee's doctor, completing that form, would supply it with sufficient information to grant the request.

In its NOFA brief, respondent argues that because the proposed decision found that it was not liable for a violation of Government Code section 12940, subdivision (a)

[discriminating against Reed on the basis of her disability], the company cannot be liable for a violation of Government Code section 12940, subdivision (k), citing *Trujillo v. North County Transit Dist.*, *supra*, 63 Cal.App.4th at pp. 28689.¹³ In this decision, we preliminarily note that we have found a violation of Government Code section (a), in addition to several other unlawful practices under the Act.¹⁴ Further, in *Dept. Fair Empl. & Hous. v. Lyddan Law Group* (Oct. 19, 2010) No. 10-4-P [2010 WL _____ (Cal.F.E.H.C.)], we held that the DFEH can bring an independent cause of action for an employer's failure to take all reasonable steps to prevent discrimination or harassment from occurring, regardless of whether any other violations are found.

With this record, we find that the DFEH has established that respondent is liable for violation of Government Code section 12940, subdivision (k), for failing to take all reasonable steps necessary to prevent discrimination from occurring.

REMEDY

Having established that respondent violated the Act, the DFEH is entitled to whatever forms of relief are necessary to make complainant whole for any loss or injury he suffered as a result. The DFEH must demonstrate, where necessary, the nature and extent of the resultant injury, and respondent must demonstrate any bar or excuse it asserts to any part of these remedies. (Gov. Code, § 12970, subd. (a); Cal. Code Regs., tit. 2, § 7286.9; *Donald Schriver, Inc. v. Fair Empl. & Hous. Com.* (1986) 220 Cal.App.3d 396, 407; *Dept. Fair Empl. & Hous. v. Madera County* (Apr. 26, 1990) No. 90-03, FEHC Precedential Decs. 1990-91, CEB 1, pp. 33-34 [1990 WL 312871 (Cal.F.E.H.C.)].)

The DFEH's accusation sought back pay, reinstatement, compensatory damages for complainant's emotional distress, an administrative fine, and affirmative relief.

¹³ Government Code section 12940, subdivision (k) provides:

It shall be an unlawful employment practice . . . :

(k) For an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

¹⁴ We note that the EEOC interprets the term "discriminate" under the Americans with Disabilities Act (ADA) (Public Law 101-336) to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." (42 U.S.C. § 12112(b)(5)(A).) Further, the "prohibition against discrimination" includes unlawful "medical examinations and inquiries." (42 U.S.C. § 12112(d)(1).) The ADA provides a "floor of protection" for disability under the FEHA (Gov. Code § 12926.1, subd. (a)).

A. Back Pay

The DFEH seeks lost wages and commissions that Reed would have earned from June 20, 2006 to June 26, 2007 but for respondent's unlawful discrimination.¹⁵ Respondent asserts that Reed would not have had bumping rights as a part-time employee, working either 16 or 30 hours per week, citing the terms of the Teamster's contract. The DFEH argues that under that contract, if Reed had worked more than 80 hours per month, which 30 hours per week would have easily allowed, she would have had bumping rights, and thus, with her seniority could have bumped a Rapid Return Agent to save her job. Because this dispute requires us to interpret the collective bargaining agreement to ascertain whether Reed would have been considered a "full-time" employee with the right to bump another full-time employee with lesser seniority or a "part-time" employee without those rights, we have limited back pay to December 31, 2006, the date Reed worked until she was laid off.

These wages include the following periods and amounts:

<u>Dates</u>	<u>Description</u>	<u>Amounts</u>
06/20/06 – 11/17/06	Unpaid leave	\$7,345.80 (22 wks x 30 hrs x \$11.13/hr)
11/18/06 – 12/31/06	Extra 14 hours per wk	<u>\$947.52</u> (6 wks x 14 hrs x \$11.28/hr)
<u>Total</u>		<u>\$8,293.32</u>

In addition, Reed could have been expected to earn the following averages in commissions working 30 hours per week, based on the rate of her prior commission earnings in 2006 during both the busy and slow months. The evidence at hearing established that respondent's busy months were June through September, while October and November and the spring months were much slower. In June 2006, a busy month, Reed earned commissions of \$2,237.88, and was paid this amount in July 2006. In the prior months, March through May 2006, when business was slower, Reed had earned an average of \$953.90 per month in commissions.¹⁶ For all of these months, Reed had worked full time, 40 hours per week. Taking a pro rata, three-quarter share of these amounts, for 30 hours rather than 40, Reed could have been expected to earn the following amounts in 2006:

¹⁵ In its NOFA brief, respondent also asserted that the proposed decision had improperly awarded Reed back pay from January 1, 2007 through June 27, 2007, a period when it asserted, Reed had testified that she was working 60-hour weeks for Eastwood Insurance Company. A close review of Reed's testimony, both on direct and cross-examination indicated, however, that she did not begin working for Eastwood until June 2007, when damages were capped, thus making submission of Reed's Eastwood W-2 irrelevant.

¹⁶ Avis Budget Group paid Reed the following commissions for March through May 2006, respectively: \$682.74; \$528.04; and \$1,650.93, an average of \$953.90 per month, or \$5.50 per hour based on a 40 hour work week. ($\$953.90 \times 12 \text{ months} = \$11,446.80 \div 52 \text{ weeks} = \$220.13 \text{ per week} \div 40 \text{ hours} = \5.50 per hour .) Each of these amounts was paid to Reed approximately one month later.

<u>Dates in 2006</u>	<u>Calculation</u>	<u>Amounts</u>
7/06	$(.75 \times \$2,237.88)$	\$1,678.41
8/06	$(.75 \times \$2,237.88)$	\$1,678.41
9/06	$(.75 \times \$2,237.88)$	\$1,678.41
10/06	$(.75 \times \$953.90)$	\$715.43
11/01/06 – 11/17/06	$(.75 \times \$953.90 \div 2)$	\$357.72
11/18/06 – 12/31/06	$(14 \text{ hrs} \times 6 \text{ wks} \times \$5.50/\text{hr})$	\$462.00 ¹⁷
<u>Total</u>		<u>\$6,570.38</u>

Adding lost wages and commissions, Reed is owed \$14,863.70. Respondent shall be ordered to pay Reed this amount, plus interest thereon, at the rate of ten percent per year, compounded annually, from the effective date the earnings accrued until the date of payment.

B. Reinstatement

In its original accusation, the DFEH sought reinstatement for Reed to the position that she would currently hold at respondent with her seniority if she had been working 30 hours per week. In an amended accusation filed September 26, 2008, the DFEH asserted that respondent had discharged and retaliated against Reed for opposing practices prohibited by the FEHA and for filing a complaint against respondent for its alleged violation of the FEHA. In its NOFA brief, respondent points out that the DFEH, in its February 3, 2009 second amended accusation, limited its claims in this administrative action to those alleged in the original accusation, not to include unlawful termination of employment and retaliation prior to Reed's layoff. While respondent is correct that the second amended accusation specifically eliminated the retaliation cause of action and sought lost wages only up to June 26, 2007, nonetheless, we note that the second amended accusation continued to ask for reinstatement or front pay in lieu of reinstatement.

The proposed decision in this matter directed the parties to "meet and confer" on the issue of whether Reed should be reinstated to a position within the company at a seniority level commensurate to what she would have attained but for the violation of the Act and retained jurisdiction over this case for the purpose of determining, if the parties are unable to agree, whether reinstatement and/or front pay should be ordered.

In its NOFA brief, respondent notes that no evidence was developed at hearing regarding the recall of Reed in June 2007 or her forfeiture of her recall rights. We agree with respondent that her reinstatement or front pay is inextricably combined with her federal lawsuit alleging retaliation and thus, her reinstatement rights should be litigated in federal

¹⁷ In November 2006, Reed went back to work for Avis Budget Group halfway through the month, but for only 16 hours per week, rather than 30, a difference of 14 hours per week. An appropriate calculation of the commissions Reed could have been expected to earn for November-December 2006 is, first, one-half of the amount that she would have earned for a whole month of commissions (11/1/06-11/17/06: $\$715.43 \div 2 = \357.72), and second, an additional 14 hours per week for six weeks at the commission hourly rate of \$5.50 per hour (11/18/06-12/31/06: $14 \text{ hours} \times 6 \text{ weeks} \times \$5.50/\text{hour} = \$462.00$).

court. Thus, the ambiguity of the DFEH's second amended accusation notwithstanding, we decline to order either reinstatement or front pay.

C. Actual Damages: Compensatory Damages for Emotional Distress

The DFEH seeks an award of emotional distress damages to Reed. (Gov. Code § 12970, subd. (a)(3).) The Commission has the authority to award actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, \$150,000 per aggrieved person per respondent. (Gov. Code, § 12970, subd. (a)(3).)

In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the Commission considers relevant evidence of the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and coworkers. The duration of the injury and the egregiousness of the discriminatory practice are also factors to be considered. (Gov. Code, § 12970, subd. (b); *Dept. Fair Empl. & Hous. v. Aluminum Precision Products, Inc.* (Mar. 10, 1988) No. 88-05, FEHC Precedential Decs. 1988-89, CEB 4, pp. 8-10 [1988 WL 242635 (Cal.F.E.H.C.)].)

In June 2006, Reed sought a reduction in her work hours as a Customer Service Representative because of her ongoing mental disabilities, major depression and PTSD, and the anxiety caused by the stresses of her day. Unfortunately for Reed, she divulged to her supervisor Matt Spain that the reason she was seeking a reduction in work hours was because of her mental disabilities. Spain immediately ordered her home, stating that he did not know if there was a job that she could do, even though she had been successfully working for the company for years, earning that month her highest commission in the prior two years.

Thereafter, placed on indefinite unpaid leave, Reed faced a five month ordeal of stonewalling by respondent and its representative, Erinn Height. Height repeatedly ignored Reed's telephone calls and those of her union representative, Donald Lawson, increasing Reed's anxiety, as she did not know the status of her accommodation request, whether or when she would be returned to work, and she felt powerless to change her situation.

The evidence established that Reed suffered from major depression and PTSD before she was placed on involuntary leave. Already depressed, this five month hiatus launched Reed into a deeper depression, as established by credible and consistent testimony from Reed, her son, and her daughter-in-law. Cut off, she reasonably believed, from her medical benefits, and thus her access to her medications and her mental health professionals, her mental health further deteriorated.

The company's failure to return Reed to work for five months created great financial hardship for Reed. Reed testified that she had suicidal thoughts because she did not have an income to support herself. Five months without a paycheck forced Reed to refinance her home, heightening her debt and distress.

Height's failure to return Reed's telephone calls left Reed feeling helpless, fearful, aggravated, humiliated and that there was no justice for her. Both Teamsters' Union Local 856 representatives and respondent officials noted Reed's distress. Union lawyer Donald Lawson and business agent Mike Lagomarsino tried to help Reed return to work and to communicate with Height. Height and other respondent officials ignored Reed and her union representatives. Height's indifference to Reed's feelings and the financial difficulties of five months of unpaid leave left Reed feeling that Height totally disregarded Reed as a human being: "She treated me like I had – like I could say it was almost like she was raping me. That's how bad I felt. I felt like I was being raped."

Reed credibly testified that she found respondent's repeated requests for access to her psychiatric medical records and insistence that she see the company's psychologist particularly invasive. Reed did not want to meet with respondent's assigned psychologist, Dr. Fox, but felt that she had no choice to keep her job. Telling Dr. Fox about her emotional history, however, was extremely upsetting, making Reed feel that she had "gone to a hospital, opened up her wound and then walked out the door."

Reed's family also noted Reed's profound distress and her worsening emotional state negatively affected her relationship with her son, his fiancée and her grandchildren. Reed was withdrawn, staying inside her home with the curtains closed. Reed lost interest in her grandchildren's lives and wouldn't take them on trips as she had in the past.

Considering the facts of this case in light of the factors set forth in Government Code section 12970, subdivision (c), we will order respondent to pay Reed \$50,000 in damages for her emotional distress.¹⁸ Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

D. Administrative Fine

The DFEH also seeks an order awarding an administrative fine against respondent. Respondent denies that any such award is appropriate.

¹⁸ The emotional distress caused by Reed's underlying medical conditions of depression or PTSD is not imputable to respondent and not part of the calculation of Reed's actual damages. This award recognizes only that portion of Reed's emotional distress caused by respondent's conduct exacerbating her symptoms of anxiety and depression and leading her to suicidal thoughts, in her efforts to be reasonably accommodated in her job at respondent. The DFEH requested an award of \$50,000. This decision finds that the evidence at hearing warranted this amount.

The Commission has the authority to order administrative fines pursuant to the Act where it finds, by clear and convincing evidence, a respondent “has been guilty of oppression, fraud, or malice, expressed or implied, as required by section 3294 of the Civil Code.” (Gov. Code, § 12970, subd. (d).) “Malice” is defined to include conduct intended to cause injury or despicable conduct, which is undertaken with a “willful and conscious disregard” of an employee’s rights. (Civ. Code § 3294, subd. (c).) “Oppression” is “despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.” (*Id.*)

In determining the appropriate amount of an administrative fine, the Commission shall consider relevant evidence of, including but not limited to, the following: willful, intentional, or purposeful conduct; refusal to prevent or eliminate discrimination; conscious disregard for the rights of the complainant; commission of unlawful conduct; intimidation or harassment; conduct without just cause or excuse, or multiple violations of the Act. (Gov. Code, § 12970, subd. (d).) Any administrative fine is payable not to complainant but to the state’s General Fund, and may not exceed, in combination with any award of compensatory damages for emotional distress, \$150,000 per complainant, per respondent. (Gov. Code, § 12970, subds. (a)(3); (b)(6)(c); and (b)(6)(d).)

The DFEH argues that the record establishes that respondent’s actions toward Reed—deliberately slowing the interactive process while Reed was on a five month unpaid leave, requiring her to choose between revealing her medical records or seeing a company doctor, and offering her an unacceptable accommodation it did not expect her to accept—constituted “cruel and unjust hardships” which were unlawful under the FEHA. And, all of these actions, it asserts, were approved by the company’s executive John Shepardson and designed by its in-house counsel, Christine Connelly Dixler.

Respondent denies that the five month delay in returning Reed to work was due to any oppressive, fraudulent or malicious conduct on its part. Rather, respondent asserts, it had a reasonable and legitimate basis for asking for additional medical information from Reed, justifying its requirement that Reed see its doctor when she would not grant access to her psychiatric medical records.

Contrary to respondent’s assertions, its conduct, as detailed below, shows a pattern of oppressive and malicious conduct. Initially, respondent immediately sent Reed home saying that it had no work that she could do when she presented her supervisor with a doctor’s note requesting a work hour reduction and revealed that the underlying mental disabilities that lead to that request. The company had accommodated numerous other similar work hour reduction requests for her, but had not known the reason for the request. Up to that point, Reed had been successfully working as a Customer Service Representative.

Second, respondent’s human resources director, Erinn Height, repeatedly refused to answer Reed’s or her union representative’s telephone calls, and the company failed to offer Reed an accommodation for five months. This dilatory conduct and inexcusable delay

caused Reed much anguish and showed a conscious disregard for Reed's right to have her accommodation request fairly and timely determined.

Further, when the company-retained doctor also stated that Reed needed to work a six-hour day, the company offered Reed a four hour shift instead, knowing that she would find this alternative objectionable because it guaranteed that she would not receive medical benefits or maintain her ability to use her seniority to shield her from an upcoming layoff by allowing her to bump a less senior employee. Respondent did not establish that its reduced hour offer was justified by business necessity. This inadequate response to Reed's reasonable accommodation request was also in conscious disregard of Reed's FEHA rights.

In its briefs, respondent states that it sought the advice of counsel concerning Reed's request for accommodation and its response and argues that "punitive damages"¹⁹ are not recoverable against a defendant that "acts in good faith and under the advice of counsel," citing *Fox v. Aced* (1957) 49 Cal.2d 381, 385. In its NOFA brief, the DFEH counters that respondent is attempting to use attorney-client privilege as both a sword and a shield by asserting the affirmative defense of reliance on counsel while refusing to disclose the substance of Height's communication with its in-house counsel. Respondent rejoins that it did not assert the "formal" defense but is merely requesting that the Commission consider the "general fact" that Height communicated with counsel during the interactive process.

A party cannot use attorney client privilege as evidence while shielding such investigation from discovery through the privilege. (*Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App. 4th 110, 127-128.) When an employer asserts that it investigated an employee's complaint and took appropriate action, then it *necessarily* puts the adequacy of the investigation at issue. (*Id.* at p. 128.)

Height testified that communication with in-house counsel affected Avis's treatment of Reed during the interactive process in three ways: 1) counsel was responsible for delays in communication with Height, resulting in several days of delay in the interactive process; 2) Height stated that she was following the advice of counsel when she did not ask Reed questions regarding her request for accommodation; and 3) counsel participated in conversations that resulted in Avis's decision to offer Reed a 16 hour work week instead of a 30 hour work week. The above testimony did not disclose the substance of communications with in-house counsel. Without substantive evidence in the record, the general fact that Height communicated with counsel cannot mitigate respondent's damages under Government Code section 12970, subdivision (d).

¹⁹ The DFEH does not seek an award of punitive damages, nor could it, as the Commission has no statutory authority to award punitive damages. (Gov. Code, § 12970, subd. (d).) Instead, the DFEH seeks the imposition of an administrative fine against respondent, a distinct remedial measure, authorized by the Legislature, 'in order to vindicate the purposes' of the Act." (*Dept. Fair Empl. & Hous. v. Wal-Mart* (June 7, 2005) No. 05-04-P [2005 WL 1703228, at *14 (Cal.F.E.H.C.)], quoting Gov. Code § 12970, subd. (c).)

Studying the record, we note, as did the administrative law judge, that only the initial 10 day delay in responding to Reed, from June 20, 2006 to June 30, 2006, was attributable to Height consulting in-house counsel, Christine Connolly Dixler. There was no testimony that the remaining delay was similarly caused.

In *Fox*, unlike here, the court was able to ascertain the defendant had relied and acted on advice of counsel in good faith *because* the defendant testified as to the substance of his communication. (*Fox v. Aced*, *supra*, 49 Cal .2d at p. 386.) In contrast, respondent refuses to offer any substantive evidence of communication between Height and in-house counsel. The company offers only evidence of the general fact that conversations occurred, which in no way demonstrates that respondent relied and acted in good faith on advice of counsel. Furthermore, in *Fox*, fraudulent conduct was based solely and directly on the counsel's advice. (*Id.* at p. 386.) Since Avis refuses to disclose counsel's advice, it offers no evidence to indicate respondent's failure to engage in the interactive process and reasonably accommodate Reed was based solely or directly on advice of counsel. Therefore, *Fox* does not apply.

Indeed, counsel *may* have advised Height her delay in providing accommodation was a violation of FEHA, which would compound the malice and oppression rather than mitigating it. Because respondent refuses to disclose the substance of their conversations with counsel, it is impossible for us to determine if and to what degree this advice would affect findings of oppression, fraud or malice required for an administrative fine under Government Code section 12970, subdivision (d).

In sum, we find that the DFEH established, by clear and convincing evidence, that respondent willfully and consciously disregarded its obligations as a California employer in denying Reed her rights to be free from unlawful medical inquiries, a timely and adequate interactive process and reasonable accommodations for her mental disabilities. Accordingly, we will order an administrative fine against respondent in the sum of \$25,000, payable to the state's General Fund, together with interest on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

E. Affirmative Relief

The DFEH asks that respondent be ordered to: cease and desist from discriminating against and refusing to offer reasonable accommodation to persons with disabilities; provide training to all of its management personnel and employees on the FEHA's requirements; and post orders, as forms of affirmative relief, under the Act.

The Act authorizes the Commission to order affirmative relief, including an order to cease and desist from any unlawful practice, and an order to take whatever other actions are necessary, in the Commission's judgment, to effectuate the purposes of the Act. (Gov. Code, § 12970, subd. (a)(5).)

We find that it is appropriate to order respondent to cease and desist from failing to reasonably accommodate employees with disabilities, and to engage in a prompt interactive process when it receives a request for reasonable accommodation. Respondent will also be ordered to post a notice acknowledging its unlawful conduct toward Reed (Attachment A) along with a notice of employees' rights and obligations regarding unlawful discrimination under the Act (Attachment B). In addition, we will order respondent to develop, implement, and disseminate a policy that advises management and supervisors of their FEHA obligation to make reasonable accommodation for respondent employees' physical or mental disabilities and to engage in a timely, good faith, interactive process with respondent employees to determine what accommodations are appropriate. Finally, we will order respondent to provide training on that policy to supervisors and managers within California.

ORDER

1. Respondent Avis Budget Group shall immediately cease and desist from failing to provide reasonable accommodation, failing to engage in a timely, good faith, interactive process, making unlawful medical inquiries, and failing to take all reasonable steps to prevent discrimination from occurring under the Fair Employment and Housing Act.

2. Respondent Avis Budget Group shall immediately cease and desist from using in California any Accommodation Request Form which requires its employees to grant permission for Avis Budget Group officials either to view employees' pertinent medical records or to speak with its employees health care providers about the employees' accommodation requests.

3. Within 60 days of the effective date of this decision, Avis Budget Group shall pay to complainant Eleanor Reed the amount of \$14,863.70 in back pay. Interest shall accrue on this amount at the rate of ten percent per year, compounded annual, from the effective date the earnings accrued until the date of payment.

4. Within 60 days of the effective date of this decision, Avis Budget Group shall pay to complainant Eleanor Reed the amount of \$50,000 in emotional distress damages. Interest shall accrue on this amount at the rate of ten percent per year, compounded annually, running from the effective date of this decision to the date of payment.

5. Within 60 days of the effective date of this decision, Avis Budget Group shall pay the amount of \$25,000 as an administrative fine, payable to the state's General Fund. Interest shall accrue on this amount at the rate of ten percent per year, compounded annually, running from the effective date of this decision to the date of payment.

6. Within 60 days of the effective date of this decision, Avis Budget Group shall develop, implement, and disseminate a policy that advises management and supervisors of their FEHA obligation to make reasonable accommodation for Avis Budget Group

employees' physical or mental disabilities and to engage in a timely, good faith, interactive process with Avis Budget Group employees to determine what accommodations are appropriate.

7. Within 90 days of the effective date of this decision, Avis Budget Group's California management level employees and all California supervisors in the chain of command shall, at Avis Budget Group's expense, attend a training program about Avis Budget Group's reasonable accommodation policy ordered in section five of this order, disability-based employment discrimination, reasonable accommodation, the interactive process and the procedures and remedies available under the Fair Employment and Housing Act.

8. Within 10 days of the effective date of this decision, Avis Budget Group's president or other authorized representative of Avis Budget Group shall complete, sign and post in all California business locations clear and legible copies of the notices conforming to Attachments A and B. These notices shall not be reduced in size, defaced, altered or covered by any material. Attachment A shall be posted for a period of 90 working days. Attachment B shall be posted permanently.

9. Within 100 days after the effective date of this decision, Avis Budget Group shall in writing notify the Department of Fair Employment and Housing and the Commission of the nature of its compliance with sections two through eight of this order.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5 and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be served on the DFEH, Commission, respondent, and complainant.

DATED: October 19, 2010

FAIR EMPLOYMENT AND HOUSING COMMISSION

GEORGE WOOLVERTON

PATRICIA PEREZ

DAVE CAROTHERS

STUART LEVITON

ATTACHMENT A

NOTICE TO ALL AVIS BUDGET GROUP EMPLOYEES AND APPLICANTS

Posted by Order of the FAIR EMPLOYMENT AND HOUSING COMMISSION
An Agency of the State of California

After a full hearing, the California Fair Employment and Housing Commission has found that Avis Budget Group is liable for failing to reasonably accommodate an employee, to engage in a good faith interactive process, and to make lawful medical inquiries because of disability. (Gov. Code, § 12940, subd. (a).) (Dept. Fair Empl. & Hous. v. Avis Budget Group (2010) No. 10-05-P.)

As a result of the violation, Avis Budget Group has been ordered to post this notice and to take the following actions:

1. Cease and desist from violating employees' rights to discrimination-free employment, reasonable accommodation, a good faith interactive process, and lawful medical inquiries under the provisions of the Fair Employment and Housing Act.
2. Pay the employee back pay and compensatory damages for emotional distress.
3. Pay the state's General Fund an administrative fine.
4. Develop, implement, and disseminate a reasonable accommodation policy for Avis Budget Group employees' physical or mental disabilities.
5. Provide training on that policy to its corporate president, directors and officers, current managers and supervisors currently working at Avis Budget Group.
6. Post a statement of employees' rights and remedies regarding discrimination based on disability, reasonable accommodation and the interactive process and conduct training about these rights.

Dated: _____

By: _____
Authorized Representative for
Avis Budget Group

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR NINETY (90) CONSECUTIVE WORKING DAYS FROM THE DATE OF POSTING AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

ATTACHMENT B

DISABILITY DISCRIMINATION AND REASONABLE ACCOMMODATION OF DISABILITIES

Employees and applicants are entitled to be free from discrimination on the basis of an actual or perceived physical or mental disability and entitled to reasonable accommodation for that disability as allowed by law. A physical disability includes having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of the body's major systems and limits a major life activity. A mental disability includes having any mental or psychological disorder or condition that limits a major life activity. If, because of your actual or perceived disability, an employer:

- refuses to hire or promote you,
- fails to provide you reasonable accommodation that is not an undue hardship to your employer,
- fails to engage in a timely, good faith interactive process to determine reasonable accommodation,
- retaliates against you,
- terminates your employment, or
- otherwise discriminates against you in your terms and conditions of employment, that employer may have violated the Fair Employment and Housing Act.

If you feel that any of these illegal practices have happened to you, or that you have been retaliated against because you opposed these practices, you have one year to file a complaint with the state Department of Fair Employment and Housing, at (800) 884-1684.

The DFEH will investigate your complaint. If the complaint has merit, the DFEH will attempt to resolve it. If no resolution is possible, the DFEH may prosecute the case with its own attorney before the Fair Employment and Housing Commission. The Commission may order the unlawful activity to stop, and require your employer to reinstate you, to pay back wages and other out-of-pocket losses, damages for emotional injury, an administrative fine, and to give other appropriate relief. Alternately, you may retain your own attorney to take your case to court.

Dated: _____

By: _____
Authorized Representative for
Avis Budget Group

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